

1992

David T. Law v. Plaza Cycle : Brief of Appellant

Utah Court of Appeals

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Stephen L. Johnston; Attorney for Appellant.

James A. McIntyre; Attorney for Appellee.

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DOCKET NO.

920190-CA

UTAH COURT OF APPEALS

STATE OF UTAH

400 MIDTOWN PLAZA, 230 SOUTH 500 EAST

SALT LAKE CITY, UTAH 84102

533-6800

DAVID T. LAW

Plaintiff/Appellee,

vs.

PLAZA CYCLE

Defendant/Appellant

Case No. 920190-CA

Priority No. 16

BRIEF APPELLANT

Appeal from a judgment of the West Valley Circuit Court, Salt Lake County, State of Utah, the Honorable Tyrone Medley.

STEPHEN L. JOHNSTON
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FILE

JUN 23 1992

COURT OF APPEALS

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STATE OF UTAH

Defendant/Appellant

Case No. 920190-CA

JURISDICTIONAL STATEMENT

This appeal was taken from a judgment which included Findings of Fact and Conclusions of Law issued by the West Valley Circuit Court, by the honorable Tyrone Medley, Dated 21 February, 1992. This appeal is from a final order of the West Valley Circuit Court, wherein the court found Defendant/Appellant liable for repairs to an off-road vehicle, and wherein the court found Defendant/Appellant liable for attorney fees arising from the case.

Jurisdiction is conferred upon this court pursuant to Section 78-2a-3(2)(d).

ISSUES PRESENTED BY APPEAL

Issue Number One: Is Plaintiff/Appellee entitled to recover attorney's fees pursuant to Section 78-27-56.5 Utah Code annotated (1953 as amended)?

DETERMINATIVE UTAH STATUTES

A. Section 78-27-56.5 Utah Code Annotated (1953 as amended).

B. Section 78-27-56.5 provides as follows:

"A court may award costs and Attorney's fees to either party that prevails in a civil action, based upon any promissory note, written contract, or other writing executed after April 28, 1986 when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees."

NATURE OF THE CASE

Plaintiff/Appellee purchased an off-road recreational vehicle from Defendant/Appellant. Plaintiff/Appellee brought the vehicle back three times for repairs. The repairs were allegedly not performed to Plaintiff/Appellee's satisfaction. Defendant/Appellant did perform repairs on each occasion the vehicle was brought back. Plaintiff/Appellee took the vehicle to another repair shop for repairs. The Court found that Defendant/Appellant was liable for repair bills.

DISPOSITION IN COURT BELOW

The West Valley Court, through Judge Medley, found that Plaintiff/Appellee was entitled to attorney's fees pursuant to Section 78-27-56.5 Utah Code Annotated, as amended, which provision allows Defendant to recover attorney's fees, where Plaintiff brings an action on a contract which contained attorney's fees and Defendant recovers.

SUMMARY OF ARGUMENT

Plaintiff/Appellee is not entitled to recover attorney's fees from Defendant/Appellant, pursuant to Section 78-27-56.5 Utah Code Annotated (1953 as amended). The West Valley Court erred in granting Plaintiff/Appellee attorney's fees. plaintiff/Appellee's request for attorney fees, which was made pursuant to section 78-27-56.5 Utah Code Annotated (1953 as amended), which allows a Defendant to recover attorney's fees, where a Plaintiff brings an action on a contract which contains attorney's fees and the Defendant recovers.

In this instance Defendant/Appellant, Plaza Cycle did not bring an action on the contract between the parties.

In addition, Plaza Cycle did not request attorney's fees or any relief in this action on the contract.


David Law brought the action in this instance. Plaza Cycle simply defended, asserting that it was not liable for the defective repairs. Plaza Cycle did in good faith assert a counter claim and request legal expense, after Plaintiff's original Complaint was dismissed. Plaza's counterclaim was made in the honest belief that David Law's second Complaint was barred by the earlier dismissal of the first complaint. The counterclaim was not based on the contract. The counterclaim was based on the reasonable belief that Plaintiff was filing a second Complaint on the same claim that had been earlier dismissed. Plaza believed the second Complaint to be in bad faith and sought legal expense per Section 78-37-56 Utah Code Annotated (1953 as amended). For this reason, the West Valley

Court's award of attorney's fees should be vacated.

CONCLUSION

The Trial Court's judgment awarding David Law attorney's fees is incorrect because Plaza Cycle did not request attorney's fees or any relief in this action on the contract. The Trial Court misconstrued Section 78-27-56.5 as it applies to this case. For this reason Judge Medley's judgment should be vacated.

DATED this 5th day of June, 1992.


STEPHEN L. JOHNSTON
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MAILING CERTIFICATE

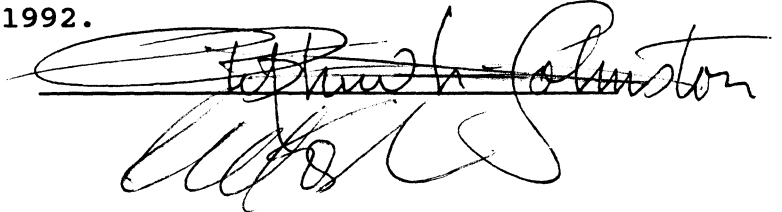
I certify that a true and correct copy of the foregoing was
HAND DELIVERED
~~mailed~~ postage prepaid to the following:

Utah Court of Appeals, 400 Midtown Plaza, 230 So. 500 E., Salt Lake City, Utah 84102.

James A. McIntyre, 360 East 4500 South #3, Murray, Utah 84107.

Plaza Cycle, 1379 West 3300 South, Salt Lake City, Utah 84119.

DATED this 5th day of June, 1992.



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FILED

JUN 23 1992

Mary E. Noonan
Clerk of Court
Utah Court of Appeals

June 22, 1992

Clerk of the Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

RE: David T. Law, Plaintiff/Appellee vs.
Plaza Cycle, Defendant/Appellant
Case No. 920190-CA

Dear Clerk of the Court:

Pursuant to the instructions in your letter dated 8 June 1992, and in accordance with Rule 29, Utah Rules of Appellant Procedure, Plaza Cycle, Defendant/Appellant, through Counsel, Stephen L. Johnston, Esq., states that the Priority of Argument in this matter is 16, as set forth in Rule 29B.

Sincerely,


Stephen L. Johnston
Attorney for Defendant/Appellant

jw:enc.Addendum to Defendant/Appellant Brief

attorney's fees pursuant to Section 78-27-56.5 Utah Code annotated (1953 as amended)?

DETERMINATIVE UTAH STATUTES

A. Section 78-27-56.5 Utah Code Annotated (1953 as amended).

B. Section 78-27-56.5 provides as follows:

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NATURE OF THE CASE

Plaintiff/Appellee purchased an off-road recreational vehicle from Defendant/Appellant. Plaintiff/Appellee brought the vehicle back three times for repairs. The repairs were allegedly not performed to Plaintiff/Appellee's satisfaction. Defendant/Appellant did perform repairs on each occasion the vehicle was brought back. Plaintiff/Appellee took the vehicle to another repair shop for repairs. The Court found that Defendant/Appellant was liable for repair bills.

DISPOSITION IN COURT BELOW

The West Valley Court, through Judge Medley, found that Plaintiff/Appellee was entitled to attorney's fees pursuant to Section 78-27-56.5 Utah Code Annotated, as amended, which provision

allows Defendant to recover attorney's fees, where Plaintiff brings an action on a contract which contained attorney's fees and Defendant recovers.

ARGUMENT

Judge medley committed an error when he ruled that David T. Law is entitled to recover attorney's fees from Plaza Cycle pursuant to Section 78-27-56.5 Utah Code Annotated, 1953 as amended, for two reasons:

A. Plaza Cycle did not bring an action on the contract between the parties.

B: Plaza did not bring an action on the contract between the parties.

The facts are that David T. Law brought the action and Plaza Cycle defended. The Defense by Plaza Cycle was not on the Contract since the code provision relied upon by Judge Medley requires that the action be on the Contract, and Plaza Cycle did not request attorney's fees or any relief on the Contract. Judge Medley made an erroneous ruling in awarding David T. Law attorney's fees.

SUMMARY OF ARGUMENT

Plaintiff/Appellee is not entitled to recover attorney's fees from Defendant/Appellant, pursuant to Section 78-27-56.5 Utah Code Annotated (1953 as amended). The West Valley Court erred in granting Plaintiff/Appellee attorney's fees. plaintiff/Appellee's request for attorney fees, which was made pursuant to section 78-27-56.5 Utah Code Annotated (1953 as amended), which allows a Defendant to recover attorney's fees, where a Plaintiff brings an

action on a contract which contains attorney's fees and the Defendant recovers.

In this instance Defendant/Appellant, Plaza Cycle did not bring an action on the contract between the parties.

In addition, Plaza Cycle did not request attorney's fees or any relief in this action on the contract.

David Law brought the action in this instance. Plaza Cycle simply defended, asserting that it was not liable for the defective repairs. Plaza Cycle did in good faith assert a counter claim and request legal expense, after Plaintiff's original Complaint was dismissed. Plaza's counterclaim was made in the honest belief that David Law's second Complaint was barred by the earlier dismissal of the first complaint. The counterclaim was not based on the contract. The counterclaim was based on the reasonable belief that Plaintiff was filing a second Complaint on the same claim that had been earlier dismissed. Plaza believed the second Complaint to be in bad faith and sought legal expense per Section 78-37-56 Utah Code Annotated (1953 as amended). For this reason, the West Valley Court's award of attorney's fees should be vacated.

CONCLUSION

The Trial Court's judgment awarding David Law attorney's fees is incorrect because Plaza Cycle did not request attorney's fees or any relief in this action on the contract. The Trial Court

misconstrued Section 78-27-56.5 as it applies to this case. For this reason Judge Medley's judgment should be vacated.

DATED this 22nd day of June, 1992.



STEPHEN L. JOHNSTON
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MAILING CERTIFICATE

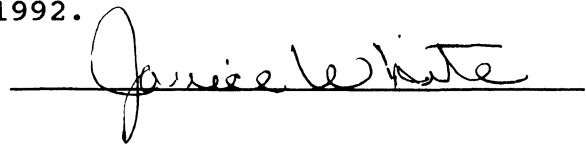
I certify that a true and correct copy of the foregoing
ADDENDUM TO BRIEF was mailed postage prepaid to the following:

Utah Court of Appeals, 400 Midtown Plaza, 230 So. 500 E., Salt
Lake City, Utah 84102.

James A. McIntyre, 360 East 4500 South #3, Murray, Utah 84107.

Plaza Cycle, 1379 West 3300 South, Salt Lake City, Utah 84119.

DATED this 22nd day of June, 1992.



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forms of civil or criminal pro-
ceedings, summonses, and subpoenas.**78-27-59. Immunity for transient shelter operators.**

(1) As used in this section means any person which provides lodging, or other products or services to transient persons.

(2) Except as provided in Subsection (1), transient shelter operators, owners, operators of transient shelters, and persons who provide products or services to transient persons are not liable from suit for damages or injury related to the damaged or injured products or services provided by them.

(3) This section does not prohibit a person for damages or injury by that person or resulting from the act.

78-27-53. Inherent risks of skiing — Bar against claim or recovery from operator for injury from risks inherent in sport.

Notwithstanding anything in Sections 78-27-37 through 78-27-43 to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing.

1986

78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act.

1979

78-27-55. Repealed.

1980

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

1988

78-27-56.5. Attorney's fees — Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

1986

CHAPTER 2

SMALL BUSINESS EQUAL ACCESS TO JUSTICE ACT

Section

78-27a-1.	Short title.
78-27a-2.	Legislative finding.
78-27a-3.	Definitions.
78-27a-4.	Litigation expense actions by state.
78-27a-5.	Litigation expense appeals from administrative actions.
78-27a-6.	Payment of expenses of litigation required in certain cases.

78-27a-1. Short title.

This act shall be known and cited as the "Small Business Equal Access to Justice Act."

78-27a-2. Legislative finding.

The Legislature finds that small businesses are deterred from seeking review of government actions substantially unjustified government actions because of the expense involved in litigation of their rights. The purpose of this act is to protect small businesses, under conditions of equal access to justice, to recover reasonable litigation costs.

78-27a-3. Definitions.

As used in this act:

(1) "Prevail" means to obtain a judgment, the right to all or part of the judgment, exhausted, on the merits, or to obtain a judgment or charges in the action.